NO. 48258-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NARINDER M. DUGGAL, M.D.,

Appellant,

v.

MEDICAL QUALITY ASSURANCE COMMISSION, DEPARTMENT OF HEALTH, STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In April of 2013, the Medical Quality Assurance Commission ("Commission") took emergency action to suspend the license to practice medicine of Narinder Duggal, M.D. The basis for the summary suspension was Dr. Duggal's sexual misconduct and/or medical malpractice related to eight different patients spanning a period of nearly six years. *See* Amended Statement of Charges, AR 111. After having requested and received a hearing date, a litigation schedule, an opportunity to conduct discovery, and the representation of multiple attorneys, Dr. Duggal signed a stipulation (the Agreed Order) withdrawing his right to a hearing and surrendering his license to practice medicine in the State of Washington. AR 3732.

Now, Dr. Duggal asks the Court to review two aspects of the administrative process afforded him. First, he seeks review of the denial of his oral motion to continue his hearing date based on his voluntary substitution of counsel three weeks prior to hearing. Br. of Appellant at 9. Second, he asks this Court to review the denial of his ex parte request to withdraw his stipulation. Br. of Appellant at 7-8. However, Dr. Duggal's requests for relief must fail. The Presiding Officer[1]

[1] RCW 18.130.050(10) authorizes the Commission, as the disciplining authority, to utilize a "presiding officer" to conduct hearings. WAC 246-11-380(1) directs the presiding officer to rule on motions.

properly exercised his discretion to deny both "motions", and articulated the tenable grounds for doing so. Dr. Duggal has not met his burden to show that denying a continuance of the hearing or withdrawal of the Agreed Order was an abuse of discretion or an arbitrary or capricious decision. Furthermore, Petitioner has not shown that his due process rights were violated by not allowing him a continuance to review "discovery."

Dr. Duggal had an opportunity for a hearing but instead opted to settle his case and sign a relinquishment of his hearing rights. Dr. Duggal's surrender should be affirmed.

II. STATEMENT OF THE ISSUES

1. Did the Presiding Officer abuse his discretion by denying Dr. Duggal's motion to continue when Dr. Duggal voluntarily substituted counsel three weeks prior to the hearing, failed to review the discovery materials and charging documents he had been personally served with over nine months prior, and failed to file a written motion to continue the overage case as required by the statutes and rules governing the proceeding?

2. Did the Presiding Officer abuse his discretion by denying Dr. Duggal's ex parte request to withdraw from the binding Agreed Order he signed to settle the matter and strike the hearing?

3. Is the Agreed Order supported by substantial evidence in the record?

III. STATEMENT OF THE CASE

A. The Medical Commission

Under RCW 18.71 and RCW 18.130, the Commission is charged with the regulation and discipline of the medical profession. This grant of authority includes a directive to develop consistent standards of care for the practice of medicine, as well as the discretion to investigate and prosecute alleged misconduct. RCW 18.71.002; RCW 18.71.003. Additionally, the Uniform Disciplinary Act (UDA) defines misconduct with respect to healthcare professionals. RCW 18.130.

The Commission is composed primarily of members of the medical profession, including thirteen physicians and two physician assistants, but also includes six public members. RCW 18.71.015. All disciplinary and investigative action is subject to the UDA. RCW 18.130.050; RCW 18.130.010.

Medical misconduct complaints are received and investigated by Commission investigators. RCW 18.130.080(1)(a). Complaints are reviewed and approved for investigation by a panel of commissioners. RCW 18.130.180(2); RCW 18.130.050(18). Following investigation, if the panel determines that misconduct has occurred, a Statement of

Charges is filed and served on the respondent physician. RCW 18.130.090. A respondent is entitled to a hearing under the Administrative Procedure Act (APA), RCW 34.05. RCW 18.130.100. These hearings are prosecuted by the Attorney General on the behalf of the Commission, although settlement negotiations are conducted by the Commission's staff attorneys. The hearings are conducted with a Health Law Judge presiding, and a panel of Commissioners serving as the decision makers.

B. The Administrative Case Against Dr. Duggal

The Commission granted Dr. Duggal a license to practice as a physician and surgeon in the state of Washington on August 18, 1998. AR[2] 242. On November 28, 2012, the Commission served Dr. Duggal with a 32 page Statement of Charges (SOC) alleging improper prescribing of controlled substances, violations of the standard of care, sexual misconduct, patient abuse and moral turpitude regarding the treatment of Patients A through F. AR 1-45.

Attorney Amy T. Forbis and her law partner, Carol Sue Janes (collectively referred to hereinafter as "counsel") appeared on behalf of Dr. Duggal on December 6 and 11, 2012, respectively. AR 46-55. Counsel requested and was granted a 45 day extension of time to file an

[2] Citations to the Certified Appeal Board Record will refer directly to the AR.

Answer. AR 53-54; 65. On January 31, 2012, Dr. Duggal filed an Answer to the charges, requested a hearing and denied each and every allegation, except the date that Respondent became licensed in the state of Washington. AR 66-74. On February 21, 2013, the Commission voluntarily provided its entire investigative file including testifying expert reports to Dr. Duggal and provided supplemental discovery on August 26, 2013. AR 758. On March 15, 2013, the Presiding Officer conducted a status conference with counsel for both parties and set a five-day hearing for August 19-23, 2013. AR 82-84. A scheduling order/notice of hearing was served on Dr. Duggal and his counsel. AR 85-87.

On April 30, 2013, a panel of the Commission summarily suspended Petitioner's license (AR 104-110) after the filing of an amended SOC charging misconduct related to two additional patients, G and H. AR 111-174. The Commission, in its Order of Summary Suspension, indicated (among other preliminary findings) that "Respondent has committed sexual misconduct with two patients to whom he also was prescribing controlled substances. Respondent has prescribed controlled substances to numerous other patients, and the Respondent neglected to provide basic primary care to a patient who was subsequently diagnosed with metastatic ovarian cancer." AR 105. The Commission concluded that the repetitive nature of Dr. Duggal's below standard

practices and the range of his violations made it impractical to address the immediate danger other than through summary suspension. AR 109.

On May 1, 2013, Dr. Duggal was personally served with the Amended SOC and the Ex Parte Motion for Summary Suspension supported by 444 pages of exhibits, including the reports of the two medical experts who had reviewed the patient records. AR 102-622. Dr. Duggal filed his Answer through Counsel on May 21, 2013, and again denied every allegation in the Amended SOC, except the date he was granted a license. AR 624-32. He did not request a show cause hearing to challenge the summary suspension of his license. AR 625.

On June 7, 2013, after a telephonic scheduling conference was held between the parties, the Presiding Officer reset the hearing date for January 27-February 3, 2014 at the request of Dr. Duggal. AR 674; WAC 246-11-260(1)(c). The following litigation schedule was also established during the call:

Witness and Exhibit List Exchange	October 11, 2013
Discovery Completion	November 19, 2013
Dispositive Motions	December 2, 2013
Prehearing Memorandum	December 31, 2013
Prehearing Conference	January 7, 2014

Dr. Duggal and his counsel were both served with the amended schedule. AR 674-677. On October 9, 2013, the Commission filed its witness and exhibit lists. AR 754-809. Dr. Duggal's witness list and exhibits were filed on October 17, 2014. AR 824-1041. The Commission filed its prehearing statement along with hearing exhibits on December 27, 2013. AR 1042-3664. Among the exhibits were the complaints relating to Patients A – H and Dr. Duggal's response to those complaints dating from November of 2010 to May of 2012. AR 1042-3664.

C. The Request For Continuance

On January 6th, 2014, three weeks before the scheduled hearing, and one day before the scheduled prehearing conference, Dr. Duggal filed a notice of Withdrawal and Substitution of Counsel, substituting new counsel Thomas Olmstead. AR 3665-67. At the scheduled prehearing conference on January 7, 2014, the Presiding Officer noted that a notice of withdrawal and substitution of counsel had been filed the day before. *See* Prehearing Order No. 3; AR 3673-74. New counsel made an oral motion for a 120-day continuance based on having just entered the case and not having seen the discovery. New counsel indicated that he only accepted the substitution on the condition of obtaining a continuance. AR 3673. Counsel for the Commission objected to the continuance and to the substitution of counsel. AR 3673.

The presiding officer denied the oral motion to continue the hearing. AR 3673. Additionally, because it was not clear whether the substitution of counsel was contingent or final, the Presiding Officer continued the prehearing conference to the next day in order to give Mr. Olmstead time to confer with prior counsel to determine who would represent Dr. Duggal at the prehearing and hearing. AR 3674. The prehearing conference resumed on January 8, 2014 with Mr. Olmstead representing Dr. Duggal. AR 3675-82.

D. The Agreed Order

One week after the prehearing conference, on January 15, 2014, Dr. Duggal and his new counsel signed a Stipulated Findings of Fact, Conclusions of Law and Agreed Order (Agreed Order) wherein Dr. Duggal agreed to surrender his credential. AR 3754. Under the terms of the Agreed Order, Dr. Duggal was informed that he had the right to defend against the allegations in the Amended SOC by presenting evidence at the hearing. *See* Agreed Order at ¶1.4, AR 3734. Dr. Duggal also waived his opportunity for a hearing if the Commission accepted the signed Agreed Order. *See* Agreed Order at ¶1.7, AR 3735. Under Section 6 of the Agreed Order, Dr. Duggal attested that he had read and understood the Agreed Order and agreed to it being presented to the Commission without his appearance. AR 3754.

On January 17, 2014, based on the filing of the Agreed Order and a "transmittal memorandum" from the Commission staff attorney, the hearing was stricken. *See* Prehearing Order No. 5, AR 3712. The transmittal memo indicated to the Presiding Officer that the Agreed Order was set to be presented to the Commission on January 23, 2014 but due to a scheduling conflict, presentation was reset for February 13, 2014. AR 3712.

On February 4, 2014, Dr. Duggal sent an ex parte letter, signed by Mr. Olmstead on his behalf, directly to the Commission requesting that the case be "re-opened." AR 3714. The Presiding Officer treated the letter as a motion to withdraw the stipulation, "even though it was not styled as such and even though it was not filed with the Adjudicative Clerk's Unit as required." *See* Prehearing Order No. 5, AR 3716-3721. On February 5, 2014 the Presiding Officer denied the motion to withdraw, but noted that the Commission would have final approval of the stipulation at the February 13 meeting and, therefore, the Presiding Officer ordered that both his order and the letter requesting withdrawal be presented to the Commission so that the Commission could make an informed decision. AR 3720.

On February 10, 2014 Mr. Olmstead filed a pleading in the form of an unsworn declaration of counsel captioned "Clarification of Order No. 5." AR 3727-31. In this pleading, Mr. Olmstead accused prior counsel of malpractice, defended his own conduct and argued with the conclusions of Prehearing Order No. 5 – the order denying withdrawal of the Agreed Order. AR 3727-31. On February 13, 2014, the signed Agreed Order was presented to the Commission and accepted as shown by the signature of the Panel Chair. AR 3755.

On February 21, 2014, Dr. Duggal filed a Petition for Judicial Review in Thurston County Superior Court. CP 4. On October 9, 2015, Dr. Duggal's petition was denied and the Commission's order upheld. CP 111. This appeal follows.

IV. ARGUMENT

The common theme underlying each of Dr. Duggal's arguments is that he did not have the opportunity to prepare for hearing due to the alleged failures of his counsel and that the Commission prevented him from remedying his situation. The record, however, runs contrary to this construction of the facts. Dr. Duggal repeatedly suggests that he did not have access to the evidence to be used against him until late in the process, but the Commission sent Dr. Duggal's counsel comprehensive discovery in early to mid-2013 and personally served him with the Amended SOC

and motion and order of summary suspension and supporting exhibits in May of 2013. AR 103; 758. Dr. Duggal also claims that he was unaware of the efforts, or lack thereof, of his prior counsel during their yearlong representation. Yet counsel's submitted exhibits strongly suggest Dr. Duggal's involvement in the case. Dr. Duggal may have been unprepared to proceed to a hearing, but that lack of preparedness should not be construed against the Department or Dr. Duggal's prior counsel.

On appeal, Dr. Duggal assigns error primarily to two procedural decisions related to his disciplinary case. First, Dr. Duggal asserts that the decision to deny his request for a continuance of the administrative hearing was either a misinterpretation of the law or an arbitrary and capricious action. Second, Dr. Duggal argues that the Presiding Officer's decision to deny his request to withdraw his stipulation was variously an error of law, arbitrary and capricious, and a violation of his constitutional due process rights. Br. of Appellant at 7-10. Dr. Duggal also argues by citing to court documents outside the administrative record that the Agreed Order is not supported by substantial evidence.

Each of Dr. Duggal's arguments must fail. The decision to deny Dr. Duggal's request for a continuance was appropriate. Dr. Duggal failed to follow proper procedure and voluntarily created the circumstances upon which his continuance request was based. The case was also overaged

based on the applicable administrative rule, which provides a "basic time period for settlement, discovery, and commencement of hearing" of 180 days or less. *See* WAC 246-14-090(2). Likewise, because Dr. Duggal agreed to present the Agreed Order to the Commission, knowingly and voluntarily waived his right to a hearing and improperly requested withdrawal of his stipulation in an ex parte letter to the Commission, it was not error to deny his request to withdraw his stipulation. The Court should reject each of Dr. Duggal's challenges and affirm the Commission's Order.

A. Standard Of Review Under The Administrative Procedure Act

The Court's review of the Commission's Order is governed by the Administrative Procedure Act (APA), RCW 34.05.570. Under the APA, a party challenging the validity of agency action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Lang v. Washington State Dep't of Health*, 138 Wn. App. 235, 243, 156 P.3d 919 (2007), *review denied*, 162 Wn.2d 1021 (2008). When reviewing an adjudicative order, a court acts in a limited appellate capacity and may reverse only if the person challenging the agency order establishes that the order is invalid for one of the nine reasons specifically enumerated in

RCW 34.05.570(3). RCW 34.05.570(1), (3); *Brown v. State, Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 11, 972 P.2d 101 (1998), *review denied*, 138 Wn.2d 1010 (1999). Here, Dr. Duggal alleges legal error, a lack of substantial evidence, and arbitrary and capricious action.

The Court reviews the Commission's legal conclusions de novo under an error of law standard. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991); *Lang,* 138 Wn. App. at 243. While the Court may substitute its view of the law for that of the agency, substantial weight must be given to the agency's interpretation of a law within its expertise and to the agency's interpretation of rules it adopted. *Verizon Nw., Inc. v. Washington Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). However, a court's denial of a motion to continue is reviewed for manifest abuse of discretion. *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 784-86, 727 P.2d 687, 691-92 (1986). A trial court abuses its discretion when its decision is manifestly unreasonable, or is based on untenable grounds or for untenable reasons. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Dr. Duggal seeks additional review of Prehearing Order No. 3 as arbitrary and capricious; however, with respect to denied requests for continuance,

those concepts are conflated. *See e.g. In re Martin*, 154 Wn. App. 252, 264-66, 223 P.3d 1221, 1227-28 (2009) (an agency abuses its discretion by exercising that discretion in an arbitrary and capricious manner).

The Commission's findings of fact must be upheld if they are supported by substantial evidence in the record. RCW 34.05.570(3)(e). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), *amended*, 909 P.2d 1294 (Wash. 1996) citing *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). This test is highly deferential to the administrative fact-finder. *ARCO Products Co. v. Washington Utilities & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005), *review denied*, 156 Wn.2d 1004 (2006). Reviewing courts will not overturn an agency decision even where the opposing party reasonably disputes the issues and introduces conflicting evidence of equal dignity. *Ferry Cnty. v. Concerned Friends of Ferry Cnty.*, 121 Wn. App. 850, 856, 90 P.3d 698 (2004), *aff'd*, 155 Wn.2d 824, 123 P.3d 102 (2005). Courts give substantial deference to an agency determination based heavily on factual matters, especially factual matters that are complex, technical, and close to the heart of the agency's

expertise. *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). Unchallenged findings are treated as verities on appeal. *Fuller v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 606, 762 P.2d 367 (1988).

An agency decision is arbitrary and capricious if it is a "willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary or capricious even though one may believe an erroneous conclusion has been reached." *Heinmiller*, 127 Wn. 2d at 609. This is a heavy burden for Dr. Duggal to meet. Action taken after giving a party ample opportunity to be heard, exercised honestly and upon due consideration, is not arbitrary and capricious. *Wash. Medical Disciplinary Bd. v. Johnston,* 99 Wn.2d 466, 483, 663 P.2d 457 (1983).

B. The Agreed Order Is Supported By Substantial Evidence

At the outset, the issue of the sufficiency of the evidence against Dr. Duggal is not properly before the Court. Dr. Duggal stipulated that the evidence was sufficient for the Commission to the make the findings of fact. AR 3735. Should this Court overturn the Agreed Order, Dr. Duggal's case would be remanded to the Commission for a hearing and his challenge to the Commission findings would be moot.

Even so, Dr. Duggal's argument that he has been exonerated in Superior Court is meritless. He points to the resolution of independent civil malpractice claims made by individual patients in an attempt to demonstrate that the Commission's action was unfounded. In doing so, he cites to evidence which is outside the agency record and therefore irrelevant. *See* RCW 34.05.562; RCW 34.05.566. However, the Commission's case is brought by the Commission, not by any individual patient. The Commission's case does not hinge in any way on the success or failure of civil actions that may be brought by a patient. Even if it did, Dr. Duggal ignores the fact that the Commission charged eight patients and only three of those sought civil redress. He does not explain how these civil charges resolve the Commission's case as related to the five other patients.

Moreover, the claims in the professional misconduct case are entirely different from medical malpractice claims. For example, RCW 18.130.180(4), which pertains to professional misconduct, requires proof of either an injury or an unreasonable risk that a patient may be harmed. In contrast, RCW 7.70.030 and .040, which set out the burden of proof and elements of proof for medical malpractice claims, require proof of an actual injury. Additionally, Dr. Duggal was charged with sexual misconduct, which is not directly analogous to a civil or criminal cause of

action because a lack of consent is not required. *See* RCW 18.130.180(24); WAC 246-919-630.

The Commission's duty is to regulate Dr. Duggal's license. The Commission's case was based on independent expert review of patient medical records and other documents gathered in its investigation of allegations of unprofessional conduct. *See* AR 180-240 (Expert Reports of Department Experts Joel L. Seres, MD and Expert Leslie Enzian, MD). The success or failure of three of the patients' civil actions is irrelevant, impertinent and immaterial to judicial review of the Commission orders in this case. Dr. Duggal's substantial evidence challenge must fail.

C. The Court's Decision To Deny Dr. Duggal's Request For A Continuance Was Appropriate

The Presiding Officer's denial of Dr. Duggal's request for a continuance is subject to very narrow review. As cited above, a trial court's denial of a motion to continue is reviewed for manifest abuse of discretion. *Willapa Trading Co.,* 45 Wn. App. at 784-86. The record on review supports the decision of the Presiding Officer and runs contrary to the assertions of Dr. Duggal. The tenable basis for the denial of the continuance request were articulated by the Presiding Officer as follows: the motion was improperly made because it was not put in writing as required by WAC 246-11-380(3); there had not been a showing of good

cause as required by WAC 246-11-380(3); the scheduled hearing date was within the maximum 180 day time period under WAC 246-14-090(2); and considerable effort had been undertaken to arrange for a Commission panel to be available for a six-day hearing. Prehearing Order No. 3 (including footnote 1), AR 3673-74. Dr. Duggal cannot demonstrate an abuse of discretion in the denial of his continuance and his request for relief on these grounds should be denied.

First, the Presiding Officer was well within his discretion to deny the motion to continue where it was not properly made. Simply put, Dr. Duggal's motion and his underlying grounds for continuance were never reduced to writing as procedural rule requires. The denial of an improper motion is not an abuse of discretion. Additionally, because Dr. Duggal failed to develop the record below by describing in writing the basis for his continuance, this Court is left with little to support Dr. Duggal's contention that sufficient cause for a continuance ever existed beyond the mere presence of his self-serving ex parte "withdrawal" letter to the Commission sent nearly one month after the Presiding Officer denied his request for continuance.

Second, the oral motion was not supported by good cause. The Presiding Officer articulated that "the voluntary changing of attorneys at the last minute is not, per se good cause for a continuance." AR 3717.

The Presiding Officer was correct. *See generally Willapa Trading Co.*, 45 Wn. App. 779. In *Willapa Trading Co.*, the trial court had denied the appellant a continuance in spite of the appellant's argument that his counsel had withdrawn and substitute counsel had insufficient time to prepare for trial. *Willapa Trading Co.*, 45 Wn. App at 785. Nonetheless, the Court of Appeals upheld the denial of the continuance request holding that "the Sixth Amendment right to effective assistance of counsel only applies to criminal proceedings, and no similar right is given to parties in civil actions." *Willapa Trading Co*, 45 Wn. App at 785 (citing *Seventh Elect Church in Israel v. Rogers*, 34 Wn. App. 105, 120, 660 P.2d 280 (1983)).[3] Although Dr. Duggal accurately cites to *Nguyen* for the proposition that physicians are entitled to a clear and convincing burden of proof, no case law supports the attachment of the full panoply of rights of criminal procedure to professional licensing disciplinary cases. Br. of Appellant at 23; *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 29 P.3d 689 (2001). Therefore, on its face, Prehearing Order No. 3 is not an abuse of discretion simply because

[3] *See also Strickland v. Washington*, 466 U.S. 668, 683-84, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (Effective assistance of counsel arises from Sixth Amendment right to counsel in criminal matters; defense counsel duty to investigate is often strategic and therefore not ineffective assistance unless investigation was only line of defense).

Dr. Duggal substituted counsel shortly before hearing or because prior counsel allegedly provided ineffective assistance.

Furthermore, review of the record shows that Dr. Duggal created his "hardship" through his own lack of diligence rather than that of his counsel. A continuance based on the failure to conduct discovery must be supported by an adequate showing of due diligence. *Bramall v. Wales*, 29 Wn. App. 390, 393, 628 P.2d 511, 513 (1981) (citing *Howland v. Day*, 125 Wash. 480, 216 P. 864 (1923)). Dr. Duggal's claim that he was unprepared to proceed to hearing due to his counsel's lack of diligence (Br. of Appellant at 45) necessarily indicates that he failed to review the extensive pleadings, including the amended statement of charges, and evidence that were served on him personally as well as his counsel. It also implies that he failed to confer with his counsel. Any claim that counsel was negligent is unsupported and dubious given the witness list and exhibits filed by counsel on his behalf. AR 824-1031. Many of Dr. Duggal's offered exhibits were presumably obtained by counsel from Dr. Duggal: *See e.g.* Exhibit 2, certificate and credentials of Dr. Duggal; Exhibit 3, Dr. Duggal's office forms; and letters and emails written to Dr. Duggal filed as Exhibits 9, 11, 16, 17 , 18, 22, 24, 25, 29, 30, 33, 34, 35, 38, 40 and 48. AR 824-1031.

Although Dr. Duggal has repeatedly asserted that his counsel failed to conduct discovery (Br. of Appellant at 45), he has not articulated with particularity how additional discovery would have helped his case or why depositions would be necessary, as opposed to cross examination of those witnesses at the hearing which was still pending at the time he signed the Agreed Order. AR 3719-3721. Dr. Duggal should be required to do so, especially in light of the fact that the Commission voluntarily provided him with complete discovery materials in February and August of 2013. AR 758. In *Colwell v. Holy Family Hosp.*, the court affirmed denial of a continuance to respond to a summary judgment motion where the requesting party failed to indicate what evidence would be established through more discovery. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210, 215 (2001), as amended on reconsideration (Mar. 1, 2001). Dr. Duggal has also failed to explain how he was unprepared to respond to evidence that was made up in large part of medical records obtained directly from Dr. Duggal himself.

Finally, the Presiding Officer noted that Dr. Duggal's case was overaged based on Department of Health case adjudication guidelines and the effort that is required to arrange a panel of Commission members to be available for a six-day hearing. WAC 246-14-090(2); AR 3673-4. Dr. Duggal misconstrues the Presiding Officer's Prehearing Order No. 3

as stating that the basic time period rules are jurisdictional (Br. of Appellant at 42-3) and minimizes the Presiding Officer's consideration of court scheduling. Br. of Appellant at 44. However, the issues of prompt disposition of litigation and court caseloads are properly before trial courts for consideration when granting continuances. *Willapa Trading Co.*, 45 Wn. App. at 786.

Dr. Duggal voluntarily chose to seek new counsel. Nothing in the record demonstrates that Dr. Duggal's decision to change counsel three weeks prior to his administrative hearing was anyone's decision but his own. Neither the Presiding Officer nor any representative from the Commission caused the purported predicament of Dr. Duggal. The Presiding Officer correctly noted that Dr. Duggal had an opportunity to review the record and to rely on his prior counsel's review and preparation of the case. Dr. Duggal's decision to change counsel simply is not good cause for a continuance. The prehearing orders set forth the tenable grounds upon which the prehearing orders were based. The decision not to continue the hearing was neither an abuse of discretion nor arbitrary and capricious.

D. The Court's Decision To Deny Dr. Duggal's Request To Withdraw The Agreed Order Was Appropriate

The APA and UDA provide the Commission with the authority to engage in informal settlement. RCW 34.05.060; RCW 18.130.098. WAC 246-11-360 sets out the Commission rules for settlement and states specifically: "if a settlement offer has been made in writing to the respondent and it is signed and returned by the respondent to the board prior to the settlement conference, all subsequent dates set in the scheduling order or other scheduling mechanism are continued pending final review of the settlement by the board." WAC 246-11-360(5). The decision to deny Dr. Duggal's request to withdraw the Agreed Order was a valid exercise of this authority and not a violation of Dr. Duggal's due process rights, or arbitrary and capricious, or an error of law.

1. The Presiding Officer's Denial Of Duggal's Request To Withdraw The Agreed Order Was Neither An Error Of Law Nor Arbitrary and Capricious

The Presiding Officer properly interpreted the statutes and Commission rules related to settlement of disciplinary cases. In doing so, the Presiding Officer neither misinterpreted the law nor acted in an arbitrary and capricious manner. The relevant language in RCW 18.180.098 and WAC 246-11-360(5) is clear on its face. Once a settlement offer has been agreed to by the respondent, the settlement

agreement is transferred to the Commission for review and acceptance. In the meantime, the relevant litigation deadlines, including the hearing date, are continued. Absent is any provision which allows the respondent to withdraw his stipulation after it has been offered and signed. The Presiding Officer recognized this lack of authority: "there are simply no grounds for allowing the Respondent to undo the stipulation he signed." Prehearing Order No. 5; AR 3720. Nonetheless, Dr. Duggal submitted an ex parte letter directly to the Commission in spite of APA and WAC provisions forbidding such communications. RCW 34.05.455; RCW 34.05.437(3); WAC 246-11-380(6).

To the extent that Dr. Duggal would vest the Presiding Officer with the inherent authority to permit the withdrawal, case law clarifies that administrative tribunals are creatures of the legislative body that creates them and they cannot possess inherent power. *Lejeune v. Clallam Cnty.*, 64 Wn. App. 257, 270-72, 823 P.2d 1144, 1151-52 (1992). With a rule that is clear on its face, providing no discretion to the Presiding Officer, there can be no error of law where the Presiding Officer merely follows his authority. Likewise, Dr. Duggal has demonstrated no arbitrary and capricious action because he has not shown that the Presiding Officer exhibited a willful disregard of the facts or law. On the contrary, the Presiding Officer accurately recounted the facts as they pertained to

Dr. Duggal and applied them to the law, which did not provide the relief that Dr. Duggal sought.

Dr. Duggal argues without authority that it was legal error for the Presiding Officer not to rule that the Agreed Order was non-binding. Br. of Appellant at 26-35. He is incorrect. The parties agreed to present the Agreed Order to the Commission for their consideration. As a matter of basic contract principle, the Commission submitted a settlement offer to Dr. Duggal, which he accepted when he signed the Agreed Order and submitted it to the Commission. As consideration, Dr. Duggal agreed to waive his right to a hearing. In exchange, the Commission dropped the allegations related to four charged patients. *See* AR 111; AR 3732. Dr. Duggal also was able to avoid the expense of hearing and the prospect of facing his peers regarding his conduct in a public forum. Furthermore, the Commission relied on the representation of Dr. Duggal to its detriment when it struck the hearing dates according to WAC 246-11-360(5) and released Commission panel members from this obligation. While the Commission kept its end of the bargain, Dr. Duggal breached his implied covenant of good faith and fair dealing[4] by signing the Agreed Order, knowing that the hearing date would be continued and allowing the Commission's witnesses to be called off and the busy Commission

[4] *See* Restatement (Second) of Contracts § 205 (1981).

members' schedules to be filled because Dr. Duggal agreed to the Agreed Order and waived his right to hearing.

To the extent the Agreed Order is referred to in the record as "tentative", "proposed" or "non-binding" that language is simply reflective of the fact that it had not yet been approved by the Commission. Should the Commission have rejected the Agreed Order, Dr. Duggal would have had the opportunity to submit a renegotiated settlement or proceed to a hearing.

Moreover, Dr. Duggal explicitly agreed that his role in settlement was complete and that the matter would be presented to the Commission: "this Agreed Order may be presented to the Commission without my appearance. I understand that I will receive a signed copy if the Commission accepts this Agreed Order." AR 3754. Such a settlement process is not unique in the administrative context. *See e.g. Jones v. State, Dep't of Health*, 170 Wn. 2d 338, 242 P.3d 825 (2010). In *Jones*, the court described a similar process as it related to the exhaustion doctrine:

> "By accepting and entering the stipulations and agreed order, the Board ended the administrative process. It is true that the Board never had an adjudicative hearing because Jones waived his right to a regularly scheduled hearing as part of the agreed order. However, as the State itself notes, the Board had the discretion to reject the agreed order. Exhaustion is necessary to give the agency a complete opportunity to review the aggrieved party's claim. The Board had its opportunity and decided to enter the agreed order; there was nothing left for Jones to exhaust."

Jones, 170 Wn.2d at 357-58. The Presiding Officer's decision not to rule that the Agreed Order was non-binding was not in error.

Dr. Duggal also attempts to analogize the Agreed Order to a criminal plea of guilty. At the outset, Dr. Duggal's analogy to a criminal plea lacks merit because the criminal rules specifically provide trial judges the authority to allow the withdrawal of a guilty plea. *See* CrR 4.2(f). The above-stated language simply does not provide the same to the Presiding Officer. Even so, to any extent that the Agreed Order is deemed analogous to an *Alford* plea, Dr. Duggal's argument still fails. Guilty pleas may not be withdrawn as a matter of right, but rather only in certain distinct circumstances, i.e. to correct a "manifest injustice." CrR 4.2(f). Dr. Duggal has not been subject to manifest injustice, nor has he identified such a circumstance. Instead, Dr. Duggal reasserts that the order was not "binding" prior to acceptance and deceptively claims that he has been "largely exonerated." Br. of Appellant at 38-40. As described above, this is inaccurate and misleading. The Court should not deem either a manifest injustice sufficient to allow him to withdraw his "plea" – the Agreed Order. Unlike a plea agreement, Dr. Duggal was able to negotiate not just the facts and legal violations, but also the ultimate sanction that would be imposed. He should not be released from such an agreement without a

showing of manifest injustice, but Dr. Duggal has failed to do so here and has therefore not demonstrated legal error.

2. The Denial Of Dr. Duggal's Request To Withdraw The Agreed Order Was Not A Violation Of Due Process

The sufficiency of administrative process under the 14th Amendment is determined using a long established balancing test weighing the following factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *Mathews v. Eldridge*, 424 U.S. 319, 321, 96 S. Ct. 893, 896, 47 L. Ed. 2d 18 (1976). The "essence" of due process is the requirement of notice and an opportunity to be heard. *Mathews*, 424 U.S. at 334. However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). The Washington Supreme Court has held that "[s]o long as the party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, this court will not disturb the

administrative decision." *Sherman v. State*, 128 Wn. 2d 164, 184, 905 P.2d 355, 367-68 (1995). Dr. Duggal was given notice and an opportunity to be heard. Dr. Duggal chose to waive that opportunity in favor of a negotiated Agreed Order. The Presiding Officer ruled that there were simply no grounds for allowing the withdrawal of the signed Agreed Order. Dr. Duggal fails to show that he was denied due process.

Although Dr. Duggal cites *Mathews*, he does not explain how the *Mathews* factors dictate a result in his favor. Br. of Appellant at 25. In fact, they do not. While Dr. Duggal focuses on his property interest in his license, *Mathews* balancing requires that this Court consider the risk of erroneous deprivation presented by the existing procedures, the value of adding the additional procedure Dr. Duggal seeks, and the Commission's interest. First, the existing procedure presents minimal risk of erroneous deprivation. Dr. Duggal is in a small class of persons who would have been charged by the Commission, represented by multiple counsel, provided with the Commission's investigative file and the opportunity for pretrial motions and discovery devices, who sign a surrender of their license and an express waiver of hearing rights instead of going to an administrative hearing to demonstrate their innocence. The risk that a physician's license is going to be erroneously deprived because he voluntarily waived his right to a hearing on the advice of counsel is so

small as to be non-existent. To argue the contrary is to assert that respondents are not responsible for their own choices in litigation. Accordingly, with such small risk of erroneous deprivation, there is minimal value to the additional safeguard of allowing the respondents to withdraw their agreements.

On the other hand, the Commission has a strong interest in its ability to promote regularity in its disciplinary proceedings. *See* RCW 18.130.010. The system in place relies on the representations of the parties. In this case, Dr. Duggal represented that he would waive his right to a hearing and surrender his license. The Presiding Officer and the Commission relied on that representation, struck the hearing, called off the panel members, and scheduled the Agreed Order for presentation. Additionally, counsel for the Commission was placed in a position to call off witnesses and cease trial preparation. To allow respondents to withdraw their settlement agreements in the circumstances presented by Dr. Duggal plainly undermines the Commission's administrative process. It allows respondents who have justifiably been denied a continuance the opportunity to simply negotiate an agreed order in bad faith, obtain the automatic continuance of the hearing date under WAC 246-11-360(5) and then attempt to "withdraw" their agreement in a thinly-veiled attempt to

end run the rules. Dr. Duggal and other respondents should not be granted such an opportunity to do so.

Dr. Duggal was presented with notice of the charges against him, a substantial administrative process under the APA and the UDA, including the right to conduct discovery, and the opportunity to be heard. He received all of the process to which he was due. His waiver of that opportunity was not a violation of due process. His request for relief on these grounds should be denied.

3. Even If This Court Determines That The Presiding Officer's Ruling That Dr. Duggal's Stipulation Was An Irrevocable Admission Was Error, Such Error Is Harmless

Dr. Duggal's final argument relating to the denial of his request to withdraw the Agreed Order is that the Presiding Officer's reliance on WAC 246-11-270(e) relating to admission of allegations was misplaced because that rule refers only to initiating documents. Br. of Appellant at 35. But even if Dr. Duggal is correct that the Presiding Officer erred in this regard, such error was harmless. First, this interpretation of WAC 246-11-270(e) was not necessary to the Presiding Officer's ruling and was never applied as to Dr. Duggal. His request to withdraw the Agreed Order was denied and thus WAC 246-11-270(e) could not have been applied to him. Second, the decision to deny the request for

withdrawal was supported by an independent, and correct, underlying basis. A trial court's judgment will be affirmed on any theory established by the pleadings and supported by the proof. *Gross v. Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978), *see also Kirkpatrick v. Dept. of Labor and Indus.*, 48 Wn.2d 51, 53, 290 P.2d 979 (1955) ("[w]here a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition"). Prehearing Order No. 5's denial of Dr. Duggal's request to withdraw was supported by the legal determination that the Presiding Officer did not have the authority to withdraw the Agreed Order. This legal theory is supported by the facts and law on review. Dr. Duggal cannot prevail on these grounds and his request for relief thereon must be denied.

V. CONCLUSION

Dr. Duggal had ample notice and opportunity to be heard. As the administrative hearing approached, he determined he wanted more time. He failed to follow the rules when seeking a continuance and his continuance request was properly denied. He then voluntarily chose to settle his case by surrendering his credential. He subsequently attempted to withdraw the settlement, knowing the hearing had been cancelled, hoping he would then obtain the continuance he had been denied.

The Presiding Officer properly exercised his discretion to deny the motions, and his orders should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of March, 2016.

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NO. 48258-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NARINDER M. DUGGAL, MD.,

Appellant,

v.

MEDICAL QUALITY ASSURANCE COMMISSION, DEPARTMENT OF HEALTH, STATE OF WASHINGTON,

Respondent.

DECLARATION OF SERVICE

I, Diane Graf, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.

2. On March 21, 2016, I deposited via U.S. mail, postage prepaid, a copy of the Brief of Respondents to:

Paul E. Fogarty
Fogarty Law Group PLLC
705 2nd Ave Ste 1050
Seattle, WA 98104-1759

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of March, 2016 at Olympia, Washington.

DIANE GRAF
Legal Assistant